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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS ORTIZ, Defendant and Appellant.	H042850 (Santa Cruz County Super. Ct. Nos. F25811, F26673)

Defendant Jose Luis Ortiz appeals from the orders denying his applications to redesignate his 2013 and 2014 felony convictions for receiving a stolen vehicle (Pen. Code, § 496d, subd. (a))[1] and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)) as misdemeanors under Proposition 47 (§ 1170.18, subd. (f)).

On appeal, Ortiz argues the trial court erred in denying his applications on the ground that these offenses were not eligible for redesignation under Proposition 47. We agree and will reverse the orders. Since the trial court expressly found that the value of each of the vehicles was less than $950, we will remand the matter to the trial court and direct that it enter new orders granting the applications.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Santa Cruz County Superior Court case No. F25811

Ortiz was charged by complaint filed on November 5, 2013, with one felony count of unlawful driving or taking of a vehicle (Veh. Code, 10851, subd. (a), count 1), one

[1] Unspecified statutory references are to the Penal Code.

felony count of unlawful receipt of a stolen vehicle (§ 496d, subd. (a), count 2), and two misdemeanor counts of violating a domestic relations court order (§ 273.6, subd. (a), counts 3, 4). On November 15, 2013, Ortiz pleaded no contest to counts 2 and 3 and the trial court dismissed the remaining counts in the interests of justice. The trial court then suspended sentence and placed Ortiz on formal probation for three years.

B. Santa Cruz County Superior Court case No. F26673

In this matter, Ortiz was charged by complaint filed on April 15, 2014, with one felony count of second degree burglary of a vehicle (§ 459, count 1), two felony counts of unlawful driving or taking of a vehicle (Veh. Code, 10851, subd. (a), counts 2, 6),[2] one felony count of attempted theft of a vehicle (§ 664, Veh. Code, § 10851, subd. (a), count 3), one felony count of possession of a controlled substance (heroin) (Health & Saf. Code, § 11350, subd. (a), count 4), two misdemeanor counts of possession of burglar's tools (§ 466, counts 5, 8), and one felony count of unlawful receipt of a stolen vehicle (§ 496d, subd. (a), count 7). The complaint further alleged that, as to counts 2, 3, 6 and 7, Ortiz had been previously convicted of felony receipt of a stolen vehicle in violation of section 496d, subdivision (a) in case No. F25811 (§ 666.5). On April 25, 2014, Ortiz pleaded no contest to counts 2 and 7 and admitted the enhancement.

The trial court sentenced Ortiz to the middle term of three years on count 2 and imposed a concurrent term of three years on count 7. The trial court dismissed the remaining charges in the interest of justice and struck the enhancement. Ortiz was also found in violation of his probation in case No. F25811 and his probation was terminated unsuccessfully.

C. Applications for redesignation

On August 3, 2015, Ortiz filed separate applications to redesignate his 2013 and 2014 felony convictions in case Nos. F25811 and F26673 as misdemeanors pursuant to

[2] In count 2, Ortiz was charged with the theft of a 1997 Honda Accord and in count 6, he was charged with the theft of a 1991 Honda Accord.

section 1170.18, subdivision (f). The People's form response to Ortiz's application in case No. F25811 objected on the ground that Ortiz has "not met his burden to show proof that the amount of theft was under $950.00." The People's response to the application in case No. F26673 objected on this same ground but further objected on the ground that Ortiz's conviction for vehicle theft was not eligible for redesignation under Proposition 47.

The parties subsequently filed written points and authorities[3] in connection with the two applications. In its briefing, the People noted that Ortiz had failed to submit any evidence supporting the valuation of the vehicle at issue in case No. F25811 (a 1997 Honda Civic) and presented a printout from the Kelley Blue Book Web site showing that such a vehicle could be sold to a private party for anywhere from $1,370 to $1,858, depending on its condition.

At the September 30, 2015 hearing, Ortiz submitted into evidence Kelley Blue Book valuations for the three vehicles at issue in case Nos. F25811 and F26673.[4] Following argument, the trial court found that the offenses of vehicle theft (Veh. Code, § 10851, subd. (a)) and unlawful receipt of a stolen vehicle (§ 496d, subd. (a)) were not eligible for redesignation under Proposition 47. However, the trial court also specifically found, based on the exhibits introduced by Ortiz, that the value of each of the three vehicles involved was less than $950.

Ortiz timely appealed.

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[3] In the briefing submitted in case No. F25811, the People specifically argued that unlawful receipt of a stolen vehicle (§ 496d, subd. (a)) is not eligible for reduction to a misdemeanor under Proposition 47.

[4] Those exhibits, which were admitted into evidence without objection, were not included in the record on appeal nor were the specific valuations mentioned at any time during the hearing.

II. DISCUSSION

On appeal, Ortiz contends that the trial court erred in failing to grant his applications for redesignation under Proposition 47 because section 1170.18 should be construed to apply to felony convictions for vehicle theft (Veh. Code, § 10851, subd. (a)) and unlawful receipt of a stolen vehicle (§ 496d, subd. (a)), as the value of the vehicles in question was $950 or less.

Ortiz acknowledges that Proposition 47 does not expressly list either Vehicle Code section 10851 or section 496d as a theft related offense which may be designated as a misdemeanor under Proposition 47. Despite this omission, Ortiz maintains that it is clear that the voters intended that *all* theft related offenses, including vehicle theft and receipt of a stolen vehicle, be treated as misdemeanors where the value of the property is less than $950. He further argues that section 496d is a narrower version of the broader misdemeanor offense of receiving stolen property with a value of $950 or less (§ 496, subd. (a)), which *is* expressly eligible for redesignation under section 1170.18, subdivision (a).

The California Supreme Court is currently considering whether Proposition 47 applies to the offense of unlawful taking or driving a vehicle (Veh. Code, § 10851) in *People v. Page*, review granted January 27, 2016, S230793. Pending further guidance from the Supreme Court, we will resolve the matter before us.

A. Relevant statutes and rules of statutory interpretation

On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 "reduced the penalties for a number of offenses." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*).) The theft related offenses enumerated in section 1170.18, subdivisions (a) and (b) that may be designated as misdemeanors under Proposition 47 include shoplifting with a value of $950 or less (§ 459.5, subd. (a)); forgery of a document with a value of $950 or less (§ 473, subd. (b)); issuing a check for

$950 or less without sufficient funds (§ 476a, subd. (b)); petty theft with a value of $950 or less (§ 490.2, subd. (a)); receiving stolen property with a value of $950 or less (§ 496, subd. (a)); and petty theft with a prior theft conviction (§ 666, subd. (a)). The offenses of vehicle theft (Veh. Code, § 10851, subd. (a)) and buying or receiving a stolen motor vehicle (§ 496d) are not among the theft related offenses listed in section 1170.18, subdivisions (a) and (b).

Section 1170.18, which was also added by Proposition 47, "creates a process where persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing." (*Sherow*, *supra*, 239 Cal.App.4th at p. 879.) Section 1170.18, subdivision (a) specifies that a person may petition for resentencing in accordance with section 490.2, which provides, in pertinent part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (§ 490.2, subd. (a).)

"[A] petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." (*Sherow*, *supra*, 239 Cal.App.4th at p. 878.) The petitioner for resentencing has the "initial burden of proof" to "establish the facts upon which his or her eligibility is based." (*Id*. at p. 880.) If the crime under consideration is a theft offense, " 'the petitioner will have the additional burden of proving the value of the property did not exceed $950.' " (*Id.* at p. 879.) If the petitioner makes a sufficient showing, the trial court "can take such action as appropriate to grant the petition or permit further factual determination." (*Id*. at p. 880.)

B. Analysis

The trial court's conclusion that Ortiz's convictions pursuant to section 496d and Vehicle Code section 10851 fall outside the scope of Proposition 47 was error as it conflicts with the plain language of section 490.2, as follows: "[O]btaining *any property*

by theft where the value of the money, labor, real or *personal property* taken does not exceed nine hundred fifty dollars ($950) *shall* be considered petty theft and *shall* be punished as a misdemeanor . . . ." (§ 490.2, subd. (a), italics added.)

Even though section 496d and Vehicle Code section 10851 are not expressly enumerated within Proposition 47, vehicles are undoubtedly personal property and thus fall within the ambit of section 490.2. Vehicle Code section 10851 punishes "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . ." (Veh. Code, § 10851, subd. (a).) This statute prohibits the taking of a vehicle worth *any amount* by a person who intends to permanently deprive the owner of his or her title to or possession of the vehicle. "Unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under [Vehicle Code] Section 10851[, subdivision] (a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered theft conviction." (*People v. Garza* (2005) 35 Cal.4th 866, 871.) "Notwithstanding . . . any other provision of law defining grand theft," section 490.2, subdivision (a) now punishes the theft of a vehicle worth $950 or less as a misdemeanor.

Similarly, section 496d, subdivision (a), states in relevant part that "Every person who buys or receives any motor vehicle . . . that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any motor vehicle . . . from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or three years or a fine of not more than ten thousand dollars ($10,000), or both, or by imprisonment in a county jail not to exceed one year or a

fine of not more than one thousand dollars ($1,000), or both." Like Vehicle Code section 10851, section 496d makes it unlawful to purchase or receive a (knowingly) stolen vehicle of *any* value. Because vehicles are indisputably property, the conduct prohibited by section 496d falls under the rubric of section 490.2 and, so long as the vehicle at issue is worth $950 or less, the offense will be treated as a misdemeanor.

Consequently, if a defendant either personally steals a vehicle or buys or receives a stolen vehicle which he or she knows to be stolen, those offenses must now be charged under section 490.2 as misdemeanors so long as the value of the vehicle at issue is less than $950. The trial court erred in concluding that Ortiz was ineligible for redesignation.

Since the trial court expressly found, on the basis of the evidence presented by Ortiz at the September 30, 2015 hearing, that the vehicles at issue in both case Nos. F25811 and F26673 were each valued at less than $950, Ortiz is entitled to the relief sought in his applications for redesignation.

III. DISPOSITION

The September 30, 2015 orders denying defendant's applications for redesignation are reversed. Upon remand, the trial court is instructed to vacate those orders and enter new orders granting those applications.

Premo, J.

I CONCUR:

Rushing, P.J.

WALSH, J., Dissenting

The majority concludes that the offenses of receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)) and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)) may be redesignated as misdemeanors under Proposition 47. I respectfully dissent.

As Ortiz concedes, neither of these offenses is expressly enumerated in Proposition 47 as eligible for redesignation. Because the plain language of Proposition 47 explicitly makes certain theft related offenses eligible for redesignation, and because Ortiz's offenses are not among them, I conclude the voters did not intend to include his offenses within the ambit of the proposition. This construction follows from the canon of *expressio unius est exclusio alterius*. "It is a settled rule of statutory construction that 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.' " (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 970, quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195.)

Accordingly, I would hold that Ortiz's offenses are ineligible for redesignation under Proposition 47, and I would affirm the trial court's orders denying his applications.

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WALSH, J.*

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*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.